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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO LUIS HERRERA,

Defendant and Appellant.

2d Crim. No. B287622  
(Super. Ct. No. TA142225)  
(Los Angeles County)

Sergio Luis Herrera was convicted in a jury trial of two counts of committing a lewd act with a child. (Pen. Code, § 288, subd. (a).)<sup>1</sup> He was sentenced to state prison for three years. He appeals contending “The trial court violated state evidentiary law and appellant’s constitutional due process and confrontation rights by excluding key impeachment evidence.” (Capitalization and bold omitted.) “Reversal is required because the prosecutor committed misconduct by exploiting the court’s error in argument.” (Capitalization and bold omitted.) These contentions are without merit and we affirm the judgment.

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<sup>1</sup> All further references are to the Penal Code.

We view the evidence in the light most favorable to the judgment as is required by the familiar rule governing appellate review. (E.g., *People v. Johnson* (1980) 26 Cal.3d 557, 576.) M.M., the victim, was born in 2000. Appellant was married to the sister of M.M.'s stepfather. She considered appellant as part of the family. She called him her uncle. When she was eight or nine years old, on two separate occasions, appellant "French kissed" her, i.e., he put his tongue into her mouth.<sup>2</sup> This frightened her and made her feel uncomfortable. Appellant told her not to tell anyone about the kisses and she did not complain to anyone about these kisses for several years. Appellant also told her that he wanted to marry her.

M.M. was troubled for years and had many interviews with social workers. This was not just the result of the kisses from appellant. Her family was in turmoil but the record does not show the reasons why. She either saw or was aware that her stepfather molested another child. She resorted to cutting herself. She finally told a social worker that appellant had done something in 2012. The police were eventually notified of the accusations.

Appellant was questioned by a police detective. At first, he denied having kissed M.M. in an inappropriate way. But, he eventually admitted that he had "French kissed" her. He said that he only did so once. When advised that M.M. was having trouble dealing with the kissing, appellant said that he loved her like a second father. He wrote her a sincere letter of apology: "This message is for [M.M.]. I already spoke with the police and told what happened. I'm sorry that you're going through all these. You know what. Forgive me. It was stupidity from my end. I wouldn't

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<sup>2</sup> Where, as here, a defendant "french kisses" a child under the age of 14 years, with the intent of arousing or gratifying his sexual desires, a section 288, subdivision (a) violation has occurred. (*In re R.C.* (2011) 196 Cal.App.4th 741, 748-749.)

have want it to happen but it did. I am human being, and we make mistakes. It hurts me because you have a life ahead of you. I hope one day you forgive me. Your Uncle Sergio.”

At trial, appellant defended on the theory that his kissing M.M. was not inappropriate, i.e., he did not put his tongue into her mouth. He also emphasized that although other persons were present when the alleged kissing occurred, no one else who was present saw him do so.

Appellant’s first contention is forfeited because he did not press for a final ruling after the trial court tentatively ruled that there would be no cross-examination of M.M. with respect to her stepfather’s alleged molestation of another child. (*People v. Holloway* (2004) 33 Cal.4th 96,133; *People v. Obie* (1974) 41 Cal.App.3d 744, 750, disapproved on other grounds in *People v. Rollo* (1977) 20 Cal.3d 109, 120.) On the merits, the trial court did not abuse its discretion in excluding this evidence. This reasoned decision, after consideration of the arguments and authorities submitted, was not arbitrary, whimsical or capricious. (See, e.g., *In re Cortez* (1971) 6 Cal.3d 78, 85-86.) As expressly indicated by the trial court, what the stepfather may have done to another child was “irrelevant” as to appellant. There was no showing that M.M. was confused about what had happened to her or that somehow, she transposed what happened to the other child and thought that it happened to her. The trial court also expressly indicated that going into the facts and circumstances of her stepfather’s molestation would be unduly time-consuming. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) This evidentiary ruling did not violate appellant’s constitutional right to confront and cross-examine an adverse witness. (E.g., *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

Nor was appellant deprived of the effective assistance of counsel by the decision not to press for a final ruling. It may well be that counsel agreed with the trial court's reasoning and knew that it could not persuade the court by asking for a final ruling. There may have been a tactical reason for not objecting and obtaining a ruling. Appellant was not prejudiced by this ruling. This was not a simple credibility contest as suggested by appellate counsel. Appellant both orally and in writing admitted "French kissing" M.M.

Appellant's second contention is also forfeited for failure to timely object and request an admonition to the jury. (*People v. Bonilla* (2007) 41 Cal.4th 313, 336.) On the merits, we conclude that there was no prosecutorial misconduct. The prosecutor did not take unfair advantage of the trial court's ruling that cross-examination concerning the stepfather's molestation of another child was not admissible. The prosecutor simply reminded the jury, in various ways, that it must decide the case based upon the evidence presented at trial and that it was not to speculate about other matters, including why M.M. had a troubled childhood. This is not deceptive, reprehensible, or unfair misconduct. (See *People v. Cortez* (2016) 63 Cal.4th 101, 130.) To the contrary, this comment is consistent with California law. (CALCRIM No. 101.) We also conclude that appellant was not deprived of the effective assistance of counsel by not objecting and requesting an admonition to the jury. Trial counsel is not required to make an unmeritorious objection. (*People v. Eckstrom* (1974) 43 Cal.App.3d 996, 1002-1003.)

The judgment is affirmed.  
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YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Kelvin D. Filer, Judge

Superior Court County of Los Angeles

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Marilyn G. Burkhardt, under appointment by the Court of  
Appeal for Defendant and Appellant.

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